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No. 85-____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SECURITIES INDUSTRY ASSOCIATION,

Petitioner,

—v.—

COMPTROLLER OF THE CURRENCY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the court below err in holding that national banks may now conduct a public securities brokerage business, when the Glass-Steagall Act expressly restricts those banks to arranging the purchase and sale of securities as an accommodation to their bank customers and, as interpreted by bank regulators for fifty years, prohibits banks from "doing a brokerage business"?

PARTIES TO THE PROCEEDING

In addition to the petitioner* and respondents listed in the caption, the following are also respondents in this action: H. Joe Selby as Acting Comptroller of the Currency of the United States and Security Pacific National Bank as Intervenor in the proceeding below.

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* Pursuant to Rule 28.1 of this Court, petitioner states as follows: The Securities Industry Association is a national trade association representing more than 500 securities brokers, dealers and underwriters who are responsible for more than 90 percent of the securities brokerage and investment banking business in the United States.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
PETITION	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. The Administrative Proceedings	3
B. The Decisions Below	5
REASONS FOR GRANTING THE WRIT	6
I. THE COURT OF APPEALS DECISION RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT	6
II. THE COURT OF APPEALS DECISION RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE	12
CONCLUSION	16
APPENDIX	

TABLE OF AUTHORITIES

Cases PAGE

American Bankers Ass'n v. *SEC*, No. 85-2482 (D.D.C. filed August 5, 1985) 14

Baker, Watts & Co. v. *Saxon*, 261 F. Supp. 247 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968)... 7

Espinoza v. *Farah Mfg. Co.*, 414 U.S. 86 (1973)..... 11

Investment Co. Institute v. *Camp*, 401 U.S. 617 (1971) 7

Investment Co. Institute v. *Federal Deposit Insurance Corp.*, 606 F. Supp. 683 (D.D.C. 1985) 13

Morton v. *Ruiz*, 415 U.S. 199 (1974) 11

New York Stock Exchange, Inc. v. *Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated sub nom. New York Stock Exchange, Inc.* v. *Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978) 5

Securities Industry Ass'n v. *Board of Governors*, 104 S. Ct. 2979 (1984) 13

Securities Industry Ass'n v. *Board of Governors*, 104 S. Ct. 3003 (1984).....*passim*

Tcherepnin v. *Knight*, 389 U.S. 332 (1967) 7

Watt v. *Alaska*, 451 U.S. 259 (1981)..... 11

Zuber v. *Allen*, 396 U.S. 168 (1969) 11

Statutes

Bank Holding Company Act of 1956, 12 U.S.C. § 1843(c)(8) 6

PAGE

Banking Act of 1933 (Glass-Steagall Act), Pub. L. No. 73-66, 48 Stat. 162 ..... *passim*
12 U.S.C. § 24 (Seventh) ..... *passim*
12 U.S.C. § 377 ..... 5, 8

Banking Act of 1935, c. 614, § 303, 49 Stat. 707 10

Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980) 12

Financial Institutions Regulation and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978) 12

Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 137 (1982) 12

Legislative Materials

Hearings on H.R. 5357 before the House Committee on Banking and Currency, 74th Cong., 1st Sess. 663 (1935) 9-10

Hearings on H.R. 7617 before the Senate Committee on Banking and Currency, 74th Cong., 1st Sess. 154-55 (1935) 10

S. 2851, 98th Cong., 2d Sess. (1984) 12

Regulations and Administrative Orders

47 Fed. Reg. 38,984 (Sept. 3, 1982) 13

48 Fed. Reg. 51,930 (Nov. 15, 1983) 14

49 Fed. Reg. 15,089 (Apr. 17, 1984) 14-15

49 Fed. Reg. 46,709 (Nov. 28, 1984) 13

50 Fed. Reg. 28,385 (July 12, 1985) 14

PAGE

12 C.F.R. § 5.34(d)(2)(i) (1985) 4

12 C.F.R. § 7.7376(d)(1) (1982) 4

Miscellaneous

American Banker, July 10, 1934 9

Annual Report of the Comptroller of the Currency (Jan. 3, 1934) 9

Application of Chemical New York Corp. to Federal Reserve Bank of New York, No. D85/15 (submitted May 6, 1985) 13

Blount & Glass, Will Banks Pass the Brokerage Test?, *ABA Banking J.*, Feb. 1985 at 61, 67 12

Blueprint for Reform, The Report of the Task Group on Regulation of Financial Services, *Fed. Sec. L. Rep.* (CCH) 1099 (Nov. 14, 1984) 12

1 *Bulletin of the Comptroller of the Currency* No. 2 (Oct. 26, 1936) 10

Digest of Opinions of the Comptroller of the Currency, § 220A (1957) 10

Digest of Opinions of the Comptroller of the Currency, §§ 220, 220A (1960) 10-11

Statement by Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, United States House of Representatives (April 4, 1984) 15

Wash. Fin. Rep. (BNA), Vol. 45, No. 6 at 202 (Aug. 5, 1985) 15

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SECURITIES INDUSTRY ASSOCIATION,

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—v.—

COMPTROLLER OF THE CURRENCY, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, the Securities Industry Association ("SIA"), respectfully prays that a Writ of Certiorari issue to review the portion of the decision of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on April 12, 1985 upholding administrative rulings by the Comptroller of the Currency ("Comptroller") that authorized national banks for the first time in half a century to act as securities brokers for the general public.

OPINIONS BELOW

The administrative determinations of the Comptroller (20a, 34a)[1] are unreported. The opinion of the District Court for the District of Columbia (4a) upholding in part and voiding in part the Comptroller's rulings is reported at 577 F. Supp. 252 (D.D.C. 1983). The *per curiam* opinion of the Court of Appeals for the District of Columbia (1a) affirming on the basis of the District Court's opinion is reported at 758 F.2d 739 (D.C. Cir. 1985).[2]

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 12, 1985. By order dated June 25, 1985, the Chief Justice extended SIA's time for filing this petition to September 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This petition concerns the Glass-Steagall Act,[3] a federal statute designed severely to restrict the securities activities of national banks. Section 16 of the Act, 12 U.S.C. § 24 (Seventh), provides in relevant part:

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1 Citations to material printed in the Appendix annexed hereto appear as "___a".

2 The decision of the Court of Appeals for the District of Columbia denying appellees' petition for rehearing and suggestion for rehearing *en banc* with respect to issues not involved in this Petition (35a) is reported at 765 F.2d 1196 (D.C. Cir. 1985).

3 The Glass-Steagall Act was enacted as part of the Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162, and is codified in various sections of Title 12 of the United States Code. The relevant sections are set out in the appendix to this petition. (43a-45a).

> The business of dealing in securities and stock by [a national bank] shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and [a national bank] shall not underwrite any issue of securities or stock. . . .

STATEMENT OF THE CASE

A. The Administrative Proceedings

After nearly fifty years of contrary administrative practice and construction, the Comptroller through his rulings challenged here has permitted national banks to enter the securities brokerage business and aggressively to promote this new activity to the public. His action came in response to applications filed by two national banks, but has the effect of a rule of general applicability.

1. The Security Pacific Application

The first application was filed by Security Pacific National Bank ("Security Pacific") to establish a *de novo* subsidiary to engage in every aspect of the discount securities brokerage business.[4] That business included purchasing and selling stocks, bonds and options to any person or entity having the legal capacity to purchase, sell or own securities, whether they are customers of the bank or not (20a). Security Pacific's brokerage service would also be made available to other banks and financial institutions which would, as "introducing brokers," offer the services to their customers (*id.*). The bank was not to offer investment advice or otherwise recommend trading

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4 A "discount" securities broker executes purchase and sell orders for investors in both listed and "over-the-counter" securities at commission rates that are generally below those charged by "full-service" brokers. "Discount" brokers generally provide no investment advice or research to their customers. They also do not underwrite issues of securities or otherwise purchase and sell securities for their own account, although they may carry securities temporarily due to errors in purchasing stocks for their customers.

activity (25a). On July 2, 1982, the Comptroller approved Security Pacific's application, stating (21a):

> [O]n its face, the Glass-Steagall Act permits those securities purchases and sales for customers in which the bank acts in the capacity of agent (*i.e.*, brokerage transactions), while generally prohibiting purchases and sales by banks acting as principal. This constitutes clear authorization for banks and, hence, their operating subsidiaries (*see* 12 C.F.R. § 7.7376)[5] to engage in the activities contemplated for [the bank's subsidiary].

2. The Union Planters Application

Following the same rationale, the Comptroller on September 20, 1982 approved a second national bank application to enter the securities brokerage business. That application had been filed by Union Planters National Bank of Memphis and sought permission to acquire an existing discount broker which solicited and executed purchase and sale orders for investors in both listed securities and over-the-counter issues (39a). As with the Security Pacific application, the bank represented that it would not provide investment advice or recommendations to its brokerage customers (41a).

The SIA brought this action on October 6, 1982, seeking declaratory and injunctive relief from the Comptroller's unprecedented rulings.

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5 12 C.F.R. § 7.7376(d)(1) (1982) provided that "all provisions of Federal Banking laws applicable to the operations of the parent bank shall be equally applicable to the operations of its operating subsidiaries." That provision is now codified at 12 C.F.R. § 5.34(d)(2)(i) (1985). It makes clear that banks cannot do indirectly through operating subsidiaries what banks are prohibited from doing directly under federal law.

B. The Decisions Below

The District Court (Flannery, J.) rejected the SIA's view that Section 16 of the Glass-Steagall Act limits banks solely to accommodating securities orders from their banking customers by forwarding them to brokers for execution. The court deferred instead to the Comptroller's new construction that banks and their operating subsidiaries, under the Glass-Steagall Act, may properly conduct a securities brokerage business for the general public, and may do so by executing orders directly on stock exchanges and in the over-the-counter market (577 F. Supp. at 257; 12a).

Relying largely upon his own earlier, vacated opinion concerning automatic investment services offered by banks,[6] Judge Flannery brushed aside decades of directly contrary interpretations by the Comptroller, labelling them as "overcautious" (577 F. Supp. at 255; 9a). The court interpreted the legislative history of the Act as indicating that Congress intended through Section 16 of the Act to permit national banks to continue operating as securities brokers to the extent they had before the Act was passed. Concluding that before the Glass-Steagall Act banks had brokered securities and stock for the public in general, Judge Flannery held that Section 16 permitted them to continue that practice (*id.*, 9a). The court also found it to be significant that, in its view, Section 20 of the Act, 12 U.S.C. § 377 (although not directly applicable because it relates solely to activities of bank affiliates), prohibits only principal activities and not agency activities such as the brokerage business at issue (*id.* at 256; 9a-10a).[7]

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6 *New York Stock Exchange, Inc.* v. *Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated sub nom. New York Stock Exchange, Inc.* v. *Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978).

7 The District Court, applying well settled precedent of this Court and other Circuit Courts, also held that the Comptroller had acted contrary to law in approving the applications of Union Planters and Security Pacific without regard to the locational restrictions of federal law. (577 F. Supp. at 260; 18a-19a.) The Court of Appeals affirmed the District Court's decision in this respect. The SIA is fully in accord with those portions of the decisions, which are not the subject of this petition.

The Court of Appeals affirmed the decision of the District Court in all respects, "generally for the reasons stated in [the District Court's] Memorandum Opinion" (758 F.2d 739, 740 (D.C. Cir. 1985); 2a).

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION RESOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The administrative rulings at issue reverse over fifty years of consistent understanding of the limits imposed by federal law on bank securities brokerage and, for the first time, permit national banks to broker securities directly for the general public.

This is the second case to reach this Court concerning recently sanctioned bank brokerage activities. In *Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 3003 (1984) ("*Schwab*"), this Court determined that securities brokerage services, offered without investment advice or control over the investment decisions made, could be provided by a non-bank affiliate of a bank holding company without violating Section 4(c)(8) of the Bank Holding Company Act, 12 U.S.C. § 1843(c)(8).[8] In upholding the authority of the Federal Reserve Board to allow such activity by a bank holding company affiliate, the Court explicitly refrained from deciding whether a *bank* may provide securities brokerage services to any extent

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8 As described by this Court, the issue presented in the *Schwab* litigation was:

> whether the Federal Reserve Board has statutory authority under § 4(c)(8) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1843(c)(8), to authorize a bank holding company to acquire a nonbanking affiliate engaged principally in retail securities brokerage.

Schwab, 104 S. Ct. at 3005.

beyond incidentally accommodating the needs of its own banking customers. *Id.* at 3001, n.20. This case squarely presents that issue, also an issue of enormous importance to the nation's securities markets and financial services industries.

The holding below resolves this issue in a manner inconsistent with this Court's approach in *Schwab* and contrary to the flat prohibitions intended by Congress. Representing Congressional reaction to the financial chaos of the late 1920's and the ensuing banking crisis of the early 1930's, the Glass-Steagall Act was a "drastic step" considered to be a "prophylactic measure directed against conditions that the experience of the 1920's showed to be great potentials for abuse." *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 629, 639 (1971). Congress did not simply regulate the securities activities of banks through the Glass-Steagall Act; it prohibited them, with only narrowly circumscribed exceptions.

The language in Section 16 relied upon by the Comptroller here is a narrow *exception* to the statutory ban on bank securities activities, which should be construed narrowly so that "the original objective of the Congress [is] not . . . weakened or impaired unless it be by later legislative action."[9] This exception was intended only to permit the continuation of passive accommodation services for bank customers.

While this Court did not specifically decide the issue in *Schwab*,[10] the reasoning of that case undercuts any continuing validity to the rationale adopted by the courts below. First, the

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9 *Baker, Watts & Co.* v. *Saxon*, 261 F. Supp. 247, 252 (D.D.C. 1966), *aff'd sub nom. Port of New York Authority* v. *Baker, Watts & Co.*, 392 F.2d 497 (D.C. Cir. 1968). It is, of course, a basic principle of statutory construction that remedial statutes are to be construed broadly to carry out Congressional intent, with their prohibitory terms enforced strictly. *E.g.*, *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967).

10 As the Court put it in *Schwab*, 104 S. Ct. at 3011, n.20:

> [Section] 16 applies only to banks, not to bank holding companies. . . . Thus, we have no occasion to determine whether § 16 would permit banks to engage in brokerage activity on the behalf of the general public as well as for their own customers.

opinion affirmed below found Congress intended Section 16 to allow banks to engage in securities brokerage activities to the extent they had done so before 1933, which, it concluded, included the sort of publicly solicited brokerage business approved by the Comptroller (577 F. Supp. at 255; 9a). This Court, however, with the extensive legislative history of Section 16 before it in *Schwab*, concluded that Section 16 authorized simply the "traditional banking service" of "arrang[ing] the purchase and sale of securities as an accommodation to their customers." *Schwab*, 104 S. Ct. at 3008. That is a far cry from the broad-scale, aggressive business the Comptroller has now approved.

Second, the opinion affirmed below regarded Section 20 of the Act[11] relevant in construing Section 16, and found the brokerage business at issue to be permissible for banks because it is permissible for bank affiliates under Section 20 (577 F. Supp. at 256; 9a-10a). This Court, however, rejecting the notion that Sections 16 and 20 of the Act are to be similarly construed, determined that "[t]here is no basis for assuming that the dissimilar phrases found in §§ 16 and 20 are coterminous." *Schwab*, 104 S. Ct. at 3011, n.20.

The courts below not only followed a different course from that directed by this Court, but they also accorded improper "deference" to the Comptroller's rulings. Not only has Congress statutorily refused any rulemaking authority to the Comptroller in this area (*see* pp. 12-13, *infra*), but the instant rulings also are inconsistent with the Comptroller's own contrary application of the Act enforced for nearly fifty years.

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11 Section 20, 12 U.S.C. § 377, provides:

> After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

The Comptroller originally held, in 1934, that Section 16 limits bank brokerage transactions to those performed for customers of the bank whose relationship with the bank exists independently of the securities transaction. In an announcement reprinted in the *American Banker*, the Comptroller stated that, in accordance with his interpretation of the Congressional intent behind Section 16:

> "I have this day held that national banks have the right to purchase and sell stocks solely upon the order and for the account of customers," but he again emphasized that "*this does not mean that national banks may do a brokerage business.*"[12]

Similarly, in 1935, the Comptroller pressed Congress to make a technical amendment to Section 16 to permit banks to arrange the purchase and sale of their customers' *stocks*, as well as investment securities (*i.e.*, high quality debt issues). The Comptroller, echoing what he had said in his July 1934 ruling, told the House Banking Committee his amendment would make clear that:

> [S]ection 16 of the Banking Act of 1933 was not intended to prohibit national banks or member banks from buying or selling stocks *solely for the account of their customers*

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12 *American Banker*, July 10, 1934 at 3. In his first Annual Report to Congress after the Act's passage (a report required by 12 U.S.C. § 14), the Comptroller had noted that "[i]t would appear from the language [of Section 16] that a national bank is prohibited from performing the service of purchasing or selling corporate stocks for the account of one of its customers." However, the Comptroller stated his belief "it was not the intention of Congress to penalize the public located in communities removed from the money centers in disposing of or purchasing securities in the form of corporate stocks for investment purposes." *Annual Report of the Comptroller of the Currency* at 11 (Jan. 3, 1934). He recommended that the section be amended also to include stock, emphasizing that "this does not entail the investment by the bank of its own funds *and the bank merely acts in an accommodating capacity.*" (*Id.*, emphasis supplied.)

> *and as an accommodation thereto* and not for their own account.[13]

Based upon the Comptroller's testimony that banks were already prohibited from a general brokerage business, uncontradicted by any other legislative history, Congress amended the Glass-Steagall Act in 1935 to include "securities and stock" within Section 16 rather than only "investment securities." Banking Act of 1935, c.614, § 303, 49 Stat. 707.

The Comptroller's office reaffirmed the limited scope of the brokerage exception in interpretations issued immediately after the 1935 amendments to the Glass-Steagall Act had been passed, and repeatedly thereafter for almost fifty years. The Comptroller's 1936 Digest of Opinions, for example, stated that Section 16:

> is to be construed as limiting the purchase and sale transactions mentioned *to actual customers of the bank, which customer relationship exists independently and apart from the particular transaction in which the bank buys or sells* upon the order and for the account of such "customer," in distinction to the relationship arising solely by virtue of the particular transaction. . . .[14]

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13 *Hearings on H.R. 5357 before the House Committee on Banking and Currency*, 74th Cong., 1st Sess. 663 (1935) (emphasis added). The Comptroller made much the same statement before the Senate Banking Committee. *Hearings on H.R. 7617 before the Senate Committee on Banking and Currency*, 74th Cong., 1st Sess. 154-55 (1935).

14 1 *Bulletin of the Comptroller of the Currency* No. 2 at 2 (Oct. 26, 1936) (emphasis added). The Comptroller's Digests published over the ensuing *three decades* were equally firm. Comptroller's Digests were published in 1948, 1957 and 1960. The Comptroller's 1957 Digest, for example, stated:

> Services in this field must be limited to actual customers of the bank—*that is, the customer relationship must exist independently of the particular securities transaction.*

Digest of Opinions of the Comptroller of the Currency, § 220A (1957) (emphasis added). Again, in 1960 the Comptroller held:

> Although R.S. 5136 [in pertinent part, § 16 of the Glass-Steagall Act] prohibits national banks from dealing in securities (except

Coming as it did after five decades of directly contrary interpretation, through the administrations of no fewer than seven different Comptrollers, the recent ruling is entitled to virtually no weight. *Watt* v. *Alaska*, 451 U.S. 259, 273 (1981). The courts below nevertheless brushed off the prior interpretations on the ground that they simply represented "an overcautious approach to bank regulation." (577 F. Supp. at 255; 9a.) The Comptroller's prior view, however, was much more than simply an administrative pronouncement—it was the understanding that led to the enactment of the statutory provision now at issue, and thus should be controlling. *See Zuber* v. *Allen*, 396 U.S. 168 (1969). Given this circumstance and the fifty years of consistent administration, the prior longstanding construction by those who were in a position best to know what Congress intended is entitled to substantial weight over recently articulated administrative revisions. *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974); *Espinoza* v. *Farah Mfg. Co.*, 414 U.S. 86, 94 (1973).

In short, the decision below, sanctioning administrative redrafting of the Glass-Steagall Act, has far-reaching implications both for banking law in particular and administrative law in general and warrants review by this Court.

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so-called "exempt" securities) for their own account, it permits them to purchase and sell securities (including stock) for the account of their customers. *However, the activities of the bank in this capacity are confined to those of an accommodation agent for the convenience of customers.*

Digest of Opinions of the Comptroller of the Currency, §§ 220, 220A (1960) (emphasis added). Although the Comptroller's Digests were discontinued in the early 1960's, the Comptroller's view of the limited accommodation brokerage exception stood until reversed in the rulings challenged here.

II.

THE COURT OF APPEALS DECISION RAISES IMPORTANT ISSUES OF NATIONAL SIGNIFICANCE

The decision in this case, like the decision in *Schwab*, is of general applicability. It holds not merely that two national banks may enter the securities brokerage business, but, in effect, permits all national banks to do so.[15] This decision comes at a time when Congress has been struggling with major legislative proposals to alter existing federal restrictions on securities activities of banks.[16] By its decision the Court of Appeals in effect sanctioned an *administrative* effort to redraft congressionally mandated restrictions on bank securities activities contained in the Glass-Steagall Act—despite Congress' refusal to accord the Comptroller rulemaking authority over just such activity.

Over the last several terms, Congress has enacted major reforms to the federal banking laws, but has repeatedly declined to modify existing restrictions on bank securities activities.[17] Indeed, the one clear message to have emerged from

15 Indeed, since the Comptroller issued his rulings, over 2,000 banks apparently regarded those rulings as a sufficient basis to offer discount brokerage services. *See* Blount & Glass, Will Banks Pass the Brokerage Test?, *ABA Banking J.*, Feb. 1985 at 61, 67.

16 *See, e.g.*, S. 2851, 98th Cong., 2d Sess. (1984), which would have permitted only bank holding company affiliates, but not national banks themselves, to engage in discount securities brokerage. In addition, Congress currently is considering proposals to reform the federal deposit insurance system, prohibit the acquisition of banks by non-depository institutions, and restructure the federal system for regulating financial institutions. *See* Blueprint for Reform, The Report of the Task Group on Regulation of Financial Services, *Fed. Sec. L. Rep.* (CCH) 1099 (Nov. 14, 1984).

17 *See, e.g.*, Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 137 (1982); Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (1980); Financial Institutions Regulation and Interest Rate Control Act of 1978, Pub. L. No. 95-630, 92 Stat. 3641 (1978).

these congressional actions is that the plain terms of the Glass-Steagall Act are *not* to be changed administratively. As the Court recently pointed out:

> Congress rejected a regulatory approach when it drafted the statute, and it has adhered to that rejection ever since. . . . As recently as 1980, Congress extended to the Comptroller of the Currency authority to issue such rules as were needed to "carry out the responsibilities of the office," but expressly continued to withhold from the Comptroller the authority to issue regulations concerning "securities activities of National Banks under the Act commonly known as the 'Glass-Steagall Act.' "[18]

Nevertheless, the Comptroller here has exercised precisely the sort of regulatory authority concerning "securities activities . . . under the Act commonly known as the 'Glass-Steagall Act' " that Congress made clear he does not have.

Obviously under intense pressure from the institutions they regulate to blur administratively the congressionally drawn limits on the securities activities of banks,[19] federal banking

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18 *Securities Industry Ass'n* v. *Board of Governors*, 104 S. Ct. 2979, 2988-89 (1984) (*quoting* the Depository Institutions Deregulation and Monetary Control Act of 1980, § 708, 94 Stat. 188, 12 U.S.C. § 93a).

19 For example, the Federal Deposit Insurance Corporation recently adopted new rules that will permit not only brokerage but securities underwriting by affiliates of the 9,000 state chartered banks under its jurisdiction. *FDIC Statement of Policy on the Applicability of the Glass-Steagall Act to Securities Activities of Subsidiaries of Insured Non-Member Banks*, 47 Fed. Reg. 38,984 (Sept. 3, 1982). *See also* Unsafe and Unsound Banking Practices, 49 Fed. Reg. 46,709 (Nov. 28, 1983) (to be codified at 12 C.F.R. pt. 337) (permitting acquisition or establishment of bona fide securities subsidiaries), *upheld*, *Investment Co. Institute* v. *Federal Deposit Insurance Corp.*, 606 F. Supp. 683 (D.D.C. 1985). Bank holding companies are seeking permission similarly to undertake expanded securities underwriting activities. *E.g.*, *Application of Chemical New York Corp. to Federal Reserve Bank of New York*, No. D85/15 (submitted May 6, 1985) (seeking approval for bank holding company affiliate to engage in agency underwriting of "stocks, bonds, debentures, notes and other securities").

regulators have begun to shatter the delicately balanced regulatory structure built by Congress to govern the financial services industries. This process has been impelled in no small degree by the rulings challenged here.

Reacting to the Comptroller's unprecedented rulings at issue in this action, for example, the Securities and Exchange Commission ("SEC") was compelled to propose a rule requiring banks that "publicly solicit brokerage business" to register with the SEC as broker-dealers. *See* 48 Fed. Reg. 51,930 (Nov. 15, 1983). The SEC explained, 48 Fed. Reg. at 51,931:

> Bank brokerage activities and related promotional practices have recently changed significantly from the accommodation functions contemplated by the Congress when it enacted the bank exclusion [in the 1934 Act]. . . . Today, so-called "discount brokerage" is aggressively promoted by many banks. . . . Rather than merely providing accommodation services to existing customers, services are provided [by banks] that are functionally indistinguishable from those offered by registered broker-dealers. . . . The Commission believes that, in enacting the bank exclusion, the Congress did not contemplate that banks would publicly solicit brokerage business. . . .[20]

Responding, in turn, to the SEC's reaction to his authorization of new bank activities, the Comptroller proposed still further rules that, *inter alia*, would have required a bank to set up a separately incorporated subsidiary to operate its brokerage businesses, and register the subsidiary with the SEC, unless the bank's brokerage activity was not advertised to the public and was limited to forwarding customer orders to a registered broker on a "fully disclosed" basis. 49 Fed. Reg. 15,089 (Apr.

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20 The SEC adopted this rule substantially as it was proposed on July 12, 1985. 50 Fed. Reg. 28,385 (July 12, 1985) (to be codified at 12 C.F.R. pt. 240). The American Bankers Association responded by immediately suing the SEC to prevent its regulation of bank-brokerage businesses. *American Bankers Ass'n* v. *SEC*, No. 85-2482 (D.D.C. filed Aug. 5, 1985).

17, 1984). The Comptroller abandoned these rules, apparently proposed to deter the SEC from going forward with any effort to regulate the securities brokerage activities of banks, after the SEC proceeded to adopt its regulation. Commenting on the SEC action, the Comptroller criticized that agency for supposedly seeking "unilaterally" to "alter the framework of bank regulation."[21]

This sort of "administrative billiards" is virtually inevitable when regulators unilaterally begin shifting a statutory balance struck by Congress. The Chairman of the Board of Governors of the Federal Reserve System, Paul Volcker, had observed in a related context: "We have a [financial] system that is changing, helter skelter, in response to a variety of economic and other forces, but with little sense of the public policy issues at stake." Urging Congress to assert its authority in the financial services field, Mr. Volker stated, "[d]eregulation by fiat, by exploitation of loopholes, and by diverse actions taken by individual states is hardly an appropriate response, and threatens to undermine and render ineffective federal oversight of banking."[22]

If the established boundaries between the securities and banking industries are to be eradicated, that policy decision should be legislated by Congress, because only it can weigh all the considerations involved. It should not be dictated, as here, by regulators' *ad hoc* rulings that erode longstanding legislative limits. Given the national significance of such a decision, this case warrants review by this Court. Absent action by this Court, the decision below only will encourage further administrative dismantling of statutory restrictions on bank activities.

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21 "OCC Drops Bank Securities Proposal in Wake of SEC Brokerage Rule," *Wash. Fin. Rep.* (BNA), Vol. 45, No. 6 at 202 (Aug. 5, 1985).

22 Statement by Paul A. Volcker, Chairman, Board of Governors of the Federal Reserve System before the Subcommittee on Telecommunications, Consumer Protection and Finance of the House Committee on Energy and Commerce, United States House of Representatives at 3, 4 (April 4, 1984), concerning proposals to restructure the financial services industries.

CONCLUSION

For all and each of the foregoing reasons, this Court should issue a Writ of Certiorari to review the portion of the decision of the United States Court of Appeals for the District of Columbia Circuit holding that national banks may engage in discount securities brokerage without violating the Glass-Steagall Act.

Dated: September 6, 1985
New York, New York

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Appendix

TABLE OF CONTENTS

PAGE

Opinion of the United States Court of Appeals for the District of Columbia Circuit in *Securities Industry Ass'n* v. *Comptroller of the Currency*, 758 F.2d 739 (D.C. Cir. 1985) 1a

Opinion of the United States District Court for the District of Columbia in *Securities Industry Ass'n* v. *Comptroller of the Currency*, 577 F.2d 252 (D.C. Cir. 1983) 4a

Decision of the Comptroller of the Currency On The Application by Security Pacific National Bank to Establish An Operating Subsidiary To Be Know As Security Pacific Discount Brokerage Services, Inc., dated August 26, 1982 ..... 20a

Decision of the Comptroller of the Currency on the Application of Union Planters National Bank of Memphis to Acquire Brenner Steed & Associates, Inc. as an Operating Subsidiary, dated September 20, 1985 34a

Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing and Suggestion of Rehearing *En Banc* of Defendant-Appellee-Cross-Appellant Comptroller of the Currency in *Securities Industry Ass'n* v. *Comptroller of the Currency*, 765 F.2d 1196 (D.C. Cir. 1985) 35a

Excerpts from the Comptroller of the Currency Administrative Record on the Application by Union Planters National Bank to Acquire Brenner Steed & Associates, Inc., as an Operating Subsidiary 39a

Relevant Provisions of the Banking Act of 1933 (The Glass-Steagall Act) 43a

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, *et al.*, APPELLANTS

No. 84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C.T. CONOVER, COMPTROLLER OF THE CURRENCY,
OFFICE OF THE COMPTROLLER OF THE CURRENCY

Appeals from the United States District Court
For the District of Columbia
(D.C. Civil Action No. 82-02865)

Argued March 25, 1985

Decided April 12, 1985

Mark H. Gallant, Attorney, Department of Justice, with whom *Richard K. Willard*, Acting Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, *Mark Leemon*, Attorney, Office of the Comptroller of the Currency, and *Anthony J. Steinmeyer*, Attorney, Department of Justice, were on the brief, for appellants in No. 84-5026 and appellees in No. 84-5085.

James B. Weidner, with whom *John M. Liftin* was on the brief, for appellant in No. 84-5085 and appellee in No. 84-5026.

Before WRIGHT, GINSBURG, and SCALIA, *Circuit Judges*.

Opinion for the court *per curiam*.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* SCALIA.

PER CURIAM: This court is in agreement with the result reached by the District Court, generally for the reasons stated in its Memorandum Opinion. *See Securities Industry Ass'n* v. *Comptroller of the Currency*, 577 F. Supp. 252 (D.D.C. 1983). We note also that the District Court's Glass-Steagall Act analysis receives substantial support from a Supreme Court opinion issued while these cases were pending on appeal. *See Securities Industry Ass'n* v. *Board of Gov.* of FRS, ____ U.S. ____, 104 S. Ct. 3003 (1984).

Affirmed.

SCALIA, *Circuit Judge*, concurring in part and dissenting in part: I concur in the court's disposition with regard to the Glass-Steagall Act. Instead of affirming the District Court's resolution of the McFadden Act issue on the merits, I would vacate and remand with instructions to dismiss for lack of jurisdiction.

The District Court found that SIA had standing to challenge the Comptroller's ruling that discount brokerage offices operated by national banks are not subject to the locational restrictions of the McFadden Act and the National Banking Act because "attempts to exceed those curbs would harm SIA's members . . . ." *Securities Industry Ass'n* v. *Comptroller of the Currency*, 577 F. Supp. 252, 258-59 (D.D.C. 1983). This conflates the constitutional requirement of injury in fact and the separate requirement that "Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated

by the statute." *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984). In my view, state banks and possibly federal banks, but not all businesses injured in fact, are within the zone of interests protected by the branch banking restrictions. *See, e.g., id.*, at 1088-89; *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 952-53 (D.C. Cir. 1982); *Tax Analysts and Advocates* v. *Blumenthal*, 566 F.2d 130, 138, 144-45 (D.C. Cir. 1977), *cert. denied*, 484 U.S. 1086 (1978).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-2865

SECURITIES INDUSTRY ASSOCIATION,

Plaintiff,

—v.—

COMPTROLLER OF THE CURRENCY, et al.,

Defendants.

MEMORANDUM OPINION

This matter is before the court on cross-motions for summary judgment. Plaintiff Securities Industry Association ("SIA"), a national trade association representing more than five hundred securities brokers, dealers and underwriters, challenges the actions of the Comptroller of the Currency, C.T. Conover, in approving the applications of two national banks for the establishment or purchase of discount securities brokerage subsidiaries. For the reasons set forth below, plaintiff's motion is granted in part and the Comptroller's decision is reversed.

Facts

On June 23, 1982, Union Planters National Bank of Memphis applied to the Comptroller for approval of the acquisition by Union Planters of Brenner Steed and Associates, Inc., a discount brokerage business in Memphis, Tennessee. In its application Union Planters said it intended to offer securities brokerage services through Brenner Steed at certain branch offices of Union Planters in Tennessee, at affiliated banks in Tennessee, and at correspondent banks in Tennessee and six other states.

On July 2, 1982 Security Pacific National Bank applied to the Comptroller for approval of its proposed establishment of

a new operating subsidiary to provide discount brokerage services. In its application Security Pacific said the new subsidiary would offer brokerage services at certain Security Pacific branch offices and might in the future offer those services at non-branch offices in California and other states. The new subsidiary will process and extend margin loans.

Brenner Steed is, and the Security Pacific subsidiary will be, "discount" brokerages, which will buy and sell securities solely as agent, on the order and for the account of customers. Neither will purchase or sell securities for its own account, nor engage in underwriting, nor give investment advice. "Discount" brokers are so characterized because their commissions are significantly lower than those charged by full-service brokers who, in addition to trading on behalf of customers, offer investment advice.

On August 26, 1982 the Comptroller approved the Security Pacific application. On September 20, 1982 the Comptroller approved the Union Planters application, and in September, 1982 Union Planters acquired Brenner Steed. This action followed.

Discussion

SIA argues that the Comptroller's decisions should be set aside as in excess of his statutory authority for two reasons. First, the operation of a brokerage business by a national bank or its affiliate violates Sections 16 and 21 of the Glass-Steagall Act of 1933, 12 U.S.C. §§ 24 Seventh, 378. Second, the operation of a brokerage business by a national bank or its affiliate at offices other than those branches which the bank is allowed to establish consistent with state law violates the McFadden Act, 12 U.S.C. §§ 36, 81. The court addresses these two arguments below.

A. *Standard of review*

The degree of deference due the Comptroller was described by this court in *New York Stock Exchange v. Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated on other grounds*, 562 F.2d

736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942, 98 S. Ct. 1520, 55 L. Ed. 2d 538 (1978) ("NYSE"):

> At the outset, the court notes that it gives "great weight" to the Comptroller's ruling. The Supreme Court has consistently held that reasonable constructions of regulatory statutes by the agencies charged with enforcement of those statutes are to be respected by reviewing courts. . . . The Comptroller's [ruling] will be respected, even if the court would have reached a different result were this a question of first impression.

404 F. Supp. at 1096 (Citations omitted). The reasons for the deference accorded the Comptroller are similar to those given by the court in *A.G. Becker, Inc.* v. *Board of Governors*, 693 F.2d 136 (D.C. Cir. 1982), explaining its deference to the opinions of that other federal body charged with banking regulation, the Board of Governors of the Federal Reserve System. In *A.G. Becker* plaintiffs, including SIA, challenged the Board's decision to allow Bankers Trust Company to act as agent in the sale of commercial paper. In upholding the Board's decision, and in reversing the district court, the court of appeals explained that the Board's decision warranted deference because of the scope of the Board's authority, its expert knowledge of commercial banking, and its application of general, undefined statutory terms to particular facts. The court wrote:

> The regulatory structure of the banking laws must be permitted to adapt to the changing financial needs of our economy. Congress has delegated to the Federal Reserve Board, rather than to this court, the complex task of applying the Act's general proscriptions to the current business reality. We must therefore defer to the Board's interpretation of the statute if that interpretation is reasonable.

693 F.2d at 141. For the same reasons, this court must uphold the Comptroller's decision if it is reasonable.

B. *The Glass-Steagall Act*

1. *The Act does not limit bank affiliates to securities transactions solely for pre-existing customers*

SIA argues that Glass-Steagall permits banks to provide brokerage services only to pre-existing, bona fide bank customers. Glass-Steagall, says SIA, intended to erect impenetrable barriers between commercial banks and investment banks in order to avoid the kind of rampant speculation of the 1920's which brought the banking system to the brink of collapse, when banks would use depositors' money to push speculative securities out on the market. In support of its argument SIA points to two provisons of Glass-Steagall. Section 21, 12 U.S.C. § 378, prohibits any organization "engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail . . . securities . . ." from engaging at the same time in the banking business.[1] Discount brokers engage in the retail purchase and sale of securities and so, argues the SIA, are prohibited from being part of a banking business at the same time.

Section 16, 12 U.S.C. § 24 Seventh, limits bank brokerage activity to that "upon the order, and for the account of, customers . . ."[2] This section, says SIA, is a very limited

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1 Section 21 of the Glass-Steagall Act, 12 U.S.C. § 378, provides in pertinent part:

> [I]t shall be unlawful . . . [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided*, That the provisions of this paragraph shall not prohibit national banks or State banks or trust companies . . . or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities to the extent permitted to national banking associations by the provisions of section 24 of this title.

2 Section 16 of the Glass-Steagall Act, 12 U.S.C. § 24, Seventh, provides in pertinent part:

exception to the otherwise unyielding barrier between commercial and investment banking established by Glass-Steagall, and exists only in order to accommodate existing bank customers. In support of its position, SIA cites several early Comptroller opinions holding that Section 16 limits bank brokerage transactions to those performed for customers of the bank whose relationship with the bank exists independently of the securities transaction. *See, e.g.*, 1 *Bulletin of the Comptroller of the Currency* No. 2 at 2 (Oct. 26, 1936). Although the first such opinion dates from 1936, SIA maintains that the Comptroller has affirmed that interpretation of Section 16 until today. The SIA concedes that the Comptroller modified his position in 1974 when, in approving an application to provide Automatic Investment Services, a ruling upheld by this court in *New York Stock Exchange* v. *Smith*, *supra*, the Comptroller reversed his prior interpretations to say that "accommodation" did not mean that banks could not charge customers for the brokerage service. But the Comptroller left untouched, says SIA, the requirement that the customer relationship exist independent of the securities transaction conducted as part of the brokerage services.

The court is not persuaded by SIA. The language of Section 16 limiting bank securities to those "for the account of customers" does not limit bank brokerage activity, but serves to distinguish such activity from buying and selling of securities by the bank for its own account. Despite the exhaustive cataloging in the legislative history of Glass-Steagall of the ills arising out of the previous intermingling of investment and commercial banking, *see, e.g.*, S. Rep. No. 77, 73rd Cong., 1st Sess. 8-10 (1933), there is no mention of limiting bank broker-

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The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association will not underwrite any issue of securities or stock: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe.

age activity. On the contrary, the one mention appearing in the legislative history says that Glass-Steagall will permit national banks to sell and buy securities for their customers "to the same extent as heretofore." *Id.* at 16. And as the Comptroller demonstrates, through citation both to earlier case law and secondary sources, prior to the passage of Glass-Steagall banks offered brokerage services to members of the general public, and not just to existing customers. *See, e.g., Blakey* v. *Brinson*, 286 U.S. 254, 52 S. Ct. 516, 76 L. Ed. 1089 (1932); *McNair* v. *Davis*, 68 F.2d 935 (5th Cir. 1934), *cert. denied*, 292 U.S. 647, 54 S. Ct. 780, 78 L. Ed. 1497 (1934).

The early opinions of the Comptroller relied on by SIA embody "an overcautious approach to bank regulation reflecting the atmosphere of the years immediately after the 1929 market crash . . . " *NYSE*, *supra*, 404 F. Supp. at 1097, and have gradually been disavowed by the Comptroller in the intervening decades. As the Comptroller stated in 1974, commenting on his reversal of an earlier decision disallowing bank charges for brokerage services:

> This [earlier] view, like many others expressed by regulators, in the immediate post-depression decades, was designed to be ultra-conservative and to confine banks as narrowly as possible in their activities. However, in this regard, the office apparently went further in the direction of conservatism than did the Congress, since neither the word nor the idea of the "accommodation" limitation appears in the statute or in any committee or floor comments.

Letter from James E. Smith, Comptroller of the Currency, to G. Duane Vieth (June 10, 1974) *reprinted in* [1973-78] Fed. Banking L. Rep. (CCH ¶ 96,272).

The court's understanding of the scope of the prohibitions of Glass-Steagall is reinforced by analysis of Section 20 of the statute, 12 U.S.C. § 377, which provides that a bank may not be affiliated with any organization which is "engaged principally in the issue, flotation, underwriting, public sale, or distribution of stocks, bonds, debentures, notes or other se-

curities."[3] The language of Section 20 makes clear that the line Congress sought to draw between commercial and investment banking did not prohibit bank affiliate brokerage activity. The prohibition of Section 20 is clearly aimed at the investment banking business by which large blocks of securities newly-issued by corporations are brought by investment banks for resale to the public. In such a transaction the investment banks buy for their own account and assume the risk that the market may not be receptive to these securities. Such activities are, therefore, fundamentally different from brokerage activities, where the broker buys and sells only as agent and for the account of the customer. The phrase "at retail" in the statute may not be read to encompass brokerage activities because it must be read consistently with the other words in the same phrase. *Third National Bank in Nashville v. Impac, Ltd.*, 432 U.S. 312, 322, 97 S. Ct. 2307, 2313, 53 L. Ed. 2d 368 (1977).

The court's conclusion is in accord with the opinion of the Board of Governors of the Federal Reserve Board approving the purchase by Bank America Corporation, a bank holding company regulated by the Board pursuant to the Bank Holding Company Act, 12 U.S.C. § 1841 *et seq.*, of the discount brokerage services through its wholly-owned subsidiary Charles Schwab & Co., Inc., 69 Fed. Res. Bull. 105 (1983). In its opinion the Board analyzed Sections 20 and 16 of the Glass-Steagall Act and concluded that the acquisition and operation of a discount brokerage service by a member bank was consistent with both the language and purpose of the Act. The Board's opinion was affirmed by the Second Circuit in *Securities Industry Association v. Board of Governors of the Federal Reserve System*, 716 F.2d 92 (2d Cir.1983).

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3 Section 20 of the Glass-Steagall Act, 12 U.S.C. § 377, provides in pertinent part:

> [N]o member bank shall be affiliated . . . with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes or other securities.

2. *The requirement that bank purchases and sales of securities be "without recourse" does not prohibit brokerage activity by bank subsidiaries*

Section 16 of Glass-Steagall limits bank securities dealings to buying and selling of securities "without recourse." SIA contends that the phrase "without recourse" must not be given a technical, commercial meaning, but must be read broadly. SIA relies on the case of *Awotin v. Atlas Exchange Bank of Chicago*, 295 U.S. 209, 55 S. Ct. 674, 79 L. Ed. 1393 (1935), where the Supreme Court wrote:

> The phrase is broader than a mere limitation upon the power to contract, although embracing that limitation. It is a prohibition of liability, whatever its form, by way of "recourse" growing out of the transaction of the business.

A brokerage subsidiary of a national bank could become contingently liable on a securities transaction, argues SIA, if the customer buyer failed to pay for the securities or if the customer seller failed to deliver the securities as promised. Such liability is prohibited by the "without recourse" limitation, says SIA.

SIA's reliance on *Awotin* is misplaced. In that case banks had agreed by separate contract to repurchase bonds at maturity at par plus accrued interest—the very sort of guarantee the Comptroller admits is prohibited by Section 16, but which is absent from a brokerage transaction. The *Awotin* court simply held that the "without recourse" language reached "any other form of contract by which the bank assumes the risk of loss which would otherwise fall on the buyer of securities." 295 U.S. at 211-12, 55 S. Ct. at 675-76. This is not the risk a bank incurs in a brokerage transaction.

As the Federal Reserve Board explained in its *Bank America* decision: "The ordinary commercial meaning of 'without recourse' indicates that section 16 prohibits a bank from assuming the liability of endorser or maker with respect to the securities bought or sold as agent of the customer." *In re Bank America Corp.*, 69 Fed. Res. Bull. at 115, n. 50. The Second Circuit upheld that determination, writing:

> [W]e do not think that Schwab trades "without recourse" simply because it faces the kind of incidental liability to which SIA refers. Schwab can maintain actions for breach of contract against customers who fail to pay for or deliver securities and thus, giving the words their ordinary meaning, is not "without recourse" against such customers.

Securities Industry Association v. Board of Governors of the Federal Reserve System, supra, 716 F.2d 92 at 100 n. 4.

In accordance with the foregoing, the court holds that the Glass-Steagall Act does not prohibit the ownership and operation by national banks of subsidiaries engaged in the brokerage business.

C. *The McFadden Act*

The National Bank Act of 1864, which created national banks, originally allowed national banks to operate only out of one central office named in the bank's certificate of incorporation. The statute provided:

> The usual business of each national banking association shall be transacted at an office or banking-house located in the space specified in its organization certificate.

R.S. 5190 (1864)

Later, state banks began to establish branch offices. In order to equalize competition between state and national banks Congress amended the banking laws in 1972 in the McFadden Act to provide that national banks could carry on their general business not only at the central office, but also at branch offices which they could establish, upon Comptroller approval, to the extent which state law permitted state banks to establish branches. Section 8 of the McFadden Act amended the National Bank Act to provide:

> The general business of each national banking association shall be transacted in the place specified in it organization certificate and in the branch or branches, if any, es-

> tablished or maintained by it in accordance with [12 U.S.C. § 36].

R.S. 5190, 12 U.S.C. § 81.

"Branches" were defined in Section 36(f) of the Act:

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business . . . at which deposits are received, or checks paid, or money lent.

12 U.S.C. § 36(f).[4]

SIA argues that, if it is legal for national banks to carry on brokerage activity through their subsidiaries, then at the very least the banks' operation of their brokerages must be limited to the branch offices they are presently permitted. Both Union Planters and Security Pacific indicated their intention to operate their brokerage subsidiaries at non-branch offices within their respective states, as well as at offices in other states across the country. Still, the Comptroller approved their applications. The Comptroller's decision, contends SIA, exceeded his authority and is contrary to the branching restrictions of the McFadden Act and so must be overturned.

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4 12 U.S.C. § 36 provides, in pertinent part:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.
>
> * * * * *
>
> (f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business at which deposits are received, or checks paid, or money lent.

1. *Standing*

The Comptroller responds to SIA's challenge by arguing first that SIA is without standing to bring it. Any additional injury which SIA might suffer from the location of brokerage subsidiary offices at places other than the bank's central office and chartered branches is speculative, says the Comptroller. And the McFadden Act branching restrictions were designed to promote competitive equality between state and national banks, not to protect securities dealers. SIA can show no injury and is not within the zone of interests sought to be protected by the Act, concludes the Comptroller, and therefore is without standing to challenge the Comptroller's decision under the Act.

The Comptroller's argument is not persuasive. In *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970) ("*Data Processing*"), the Supreme Court held that an organization of providers of data processing services had standing to challenge a ruling by the Comptroller permitting national banks to make data processing services available to other banks and to bank customers. The organization had standing, the court explained, in part because they had alleged that "competition by national banks in the business of providing data processing services might entail some future loss of profits for petitioners." 397 U.S. at 152, 90 S. Ct. at 829. Similarly, SIA has alleged that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them. And it is obvious that the greater number of offices from which banks are allowed to conduct their brokerage business, the greater will be the inroads the banks will be able to make into the business of SIA's members. Accordingly, SIA has alleged sufficient injury to confer standing.

Nor need there be any explicit expression in the statute or its legislative history for the court to find that SIA is within the zone of interests protected by the McFadden Act. In *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 91 S. Ct. 158, 27 L. Ed. 2d 179 (1970), the Supreme Court reversed the dismissal for lack

of standing of a complaint by independent travel agents who challenged the Comptroller's ruling that national banks may provide travel services for their customers. The court, relying on *Data Processing*, noted "a growing trend 'toward enlargement of the class of people who may protest administrative action.' " 400 U.S. at 46, 91 S. Ct. at 159. The court in *Data Processing* "did not rely on any legislative history showing that Congress desired to protect data processors alone." *Id.* The question is whether a challenged statute " 'arguably brings a competitor within the zone of interests protected by it.' " *Id.*

The only mention [in] *Data Processing* of the legislative history of the statutory provision at issue was that the provision was a "response to the fears expressed by a few senators, that without such a prohibition, the bill would have enabled 'banks to engage in a nonbanking activity,' and thus constitute 'a serious exception to the accepted public policy which strictly limits banks to banking.' " *Arnold Tours, supra,* 400 U.S. at 46 n.3, 91 S. Ct. at 159 n. 3, quoting *Data Processing, supra,* 397 U.S. at 155, 90 S. Ct. at 830 (citations omitted). Similarly here, the branching restrictions of the McFadden Act, read in conjunction with the original restrictions of the National Bank Act limiting national banks to one central office, evince the intent of Congress to curb the scope of national banks' activities. To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours.* Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

2. *The McFadden Act limits the business of a national bank's discount brokerage subsidiary to the bank's central office and chartered branches*

On the merits, the Comptroller argues that the branching restrictions of the McFadden Act apply only to the three activities which are enumerated in the definition of "branch" within the statute: receipt of deposits, payment on checks, or

lending money. Only one of these activities will even arguably exist at the brokerage offices—the lending of money when the brokerage extends margin loans to customers, but those loans will only "originate" at the brokerage offices. Final approval will be given at the central office, and under Comptroller regulations, 12 C.F.R. § 6.7380, the origination of a loan later approved at another office does not constitute the lending of money by the originating office. Because brokerage activities are not among those enumerated in the Act, says the Comptroller, its restrictions do not apply. In any event, he concludes, the Act limits only the branches which a national bank may have within the state of its central office. No restrictions apply to offices outside that state.

After careful consideration of the Comptroller's decision, and with due regard for the deference owed him, the court finds that the Comptroller exceeded his authority, in contravention of law, in approving the applications of Union Planters and Security Pacific without regard to the branching restrictions of the McFadden Act. The Comptroller's literal reading of the statute is contradicted, first, by the legislative history of the Act. Shortly after the Act's passage, its sponsor, Representative McFadden, placed a section-by-section analysis of it in the Congressional Record. That analysis described the definition of "branch" in Section 36(f) as follows:

> [Section 36(f)] defines the term "branch." Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or *transacting any business carried on at the main office* is a branch if it is legally established under the provisions of this act.

68 Cong. Rec. 5816 (1927) (emphasis added). Although the Comptroller urges the court to disregard Representative McFadden's remarks because they came after the Act's passage, other courts have cited the above passage as authoritative. *See, e.g., First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 134 n.8, 80 S. Ct. 337, 343 n.8, 24 L. Ed. 2d 312 (1969); *Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 931-32 (D.C. Cir. 1976).

The Supreme Court has indicated that a broader, more flexible interpretation must be made of the statute than that followed by the Comptroller. In *Dickinson*, *supra*, the Comptroller gave a national bank in Florida permission to operate an armored car and a secured receptacle in a shopping center, both staffed by tellers, for the receipt of deposits and cashing of checks by customers. State banking regulators ordered the bank to stop providing the off-premises services because Florida law prohibits branch banking altogether. The bank brought suit for declaratory and injunctive relief in federal court. The Supreme Court held that the off-premises services constituted a "branch" in violation of the McFadden Act, and in doing so explained:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include". The definition suggests a calculated *indefiniteness* with respect to the outer limits of the term. However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; *it may include more.*

396 U.S. at 135, 90 S. Ct. at 344 (emphasis added).

Other courts faced with similar questions have expressly held that bank offices at which business is conducted other than the three functions enumerated in the Act nonetheless are "branches" within Section 36 and therefore subject to state law restrictions on branch locations. In *St. Louis County National Bank* v. *Mercantile Trust Company National Association*, 548 F.2d 715 (8th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S. Ct. 2975, 53 L. Ed. 2d 1093 (1977), the Comptroller approved the establishment by Mercantile of a trust office in a St. Louis suburb. A state bank brought suit for declaratory and injunctive relief, contending that the trust office had been established in violation of state law limiting bank branches. Mercantile argued, as does the Comptroller here, that because the trust office did not receive deposits, pay checks, or lend money, the McFadden Act did not apply. The Eighth Circuit rejected the

argument, affirming the district court grant of injunctive relief, concluding "the three routine banking functions delineated in Section 36(f) are not the only indicia of branch banking." 548 F.2d at 719. Examining the services provided by the trust office, the court found that the office performed services routinely offered at the bank's main office and increased convenience for the bank's customers. Based on those facts, the court held that the trust office was a "branch" within Section 36(f). *Cf. Colorado* v. *First National Bank of Fort Collins*, 540 F.2d 497, 499-500 (10th Cir. 1976) ("accepting deposits, or paying checks or lending money are not the only indicia of branch banking. The typical bank at the present time provides many other services"), *cert. denied*, 429 U.S. 1091, 97 S. Ct. 1102, 51 L. Ed. 2d 537 (1977).

This court has held that the Glass-Steagall Act permits national banks to operate discount brokerage subsidiaries. The provision of brokerage services as described in the Security Pacific and Union Planters applications—at numerous locations in many states—is clearly aimed at attracting and servicing customers conveniently. The brokerage business, therefore, is within the category of "general business" which national banks may conduct at their main office and, as such, is subject to the branching restrictions in 12 U.S.C. § 81 and 12 U.S.C. § 36.

The Comptroller's final argument that the McFadden Act restrictions apply only to branches within the state where the bank has its central office must also be rejected. It ignores completely the fact that the McFadden Act was a limited extension of the National Banking Act provisions of the location of bank offices, which previously had allowed national banks only one central office. Never have national banks been authorized under the National Bank Act to maintian offices outside their home state.

In accordance with the foregoing, the court holds that an office of a national bank for the conduct of discount brokerage activities is a "branch" within the definition of Section 36(f) of the McFadden Act, subject to state law restrictions on

the establishment of bank branch offices. The Comptroller's decision to the contrary, in approving the applications of Security Pacific and Union Planters for the establishment or purchase of a discount brokerage subsidiary without regard to the branching restrictions of the McFadden Act, shall therefore be reversed.

The parties shall submit proposed Judgments in accordance with this Opinion within ten days of the date of its filing.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

DECISION OF THE COMPTROLLER OF THE CURRENCY ON THE APPLICATION BY SECURITY PACIFIC NATIONAL BANK TO ESTABLISH AN OPERATING SUBSIDIARY TO BE KNOWN AS SECURITY PACIFIC DISCOUNT BROKERAGE SERVICES, INC.

DECISION

Background

Security Pacific National Bank (Security Pacific), Los Angeles, California, proposes to establish an operating subsidiary to be named Security Pacific Discount Brokerage Services, Inc. (Discount Brokerage). The subsidiary will engage, solely as agent on behalf of its customers, in the purchase and sale of all types of securities. It will also provide margin loans to customers and pay interest on credit balances in customer accounts in accordance with applicable requirements. These services will initially be offered to the public throughout the State of California at authorized branch offices. However, Discount Brokerage intends ultimately to offer these services at non-branch locations inside and outside California. It also intends ultimately to make these services available to the customers of other financial institutions that will act as introducing brokers. Certain incidental operations, such as maintaining record custody of customer's securities and clearing and settlement of transactions, may be performed at an office outside California.

Discount Brokerage will be a registered broker-dealer under the Securities Exchange Act of 1934, registering first with the Securities and Exchange Commission and later with the National Association of Securities Dealers. It will also register with the California Department of Corporations and, to the extent required, other state securities commissions. Discount Brokerage may also seek membership on one or more national securities exchanges.

Applicability of the Glass-Steagall Act

A reading of the provisions of the Banking Act of 1933 commonly referred to as the Glass-Steagall Act - *i.e.*, Sections 16, 20, 21 and 32 - and of the relevant legislative history and judicial decisions makes it clear that only certain specified securities activities are prohibited to banks. Specifically, Section 16 of the Act, codified in 12 U.S.C. § 24 (Seventh), states that national banks may not, with various exceptions not relevant here, "underwrite any issue of securities or stock." The Section, however, further delineates permissible and impermissible activities in stating that the "business of dealing in securities and stock by the [national banking] association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account." Thus, on its face, the Glass-Steagall Act permits those securities purchases and sales for customers in which the bank acts in the capacity of agent (*i.e.*, brokerage transactions), while generally prohibiting purchases and sales by banks acting as principal. This constitutes clear authorization for banks and, hence, their operating subsidiaries (*see* 12 C.F.R. § 7.7376) to engage in the activities contemplated for Discount Brokerage.

Certain early opinions of this Office imposed limitations upon the securities brokerage activities of national banks. As early as 1936, the Office expressed the opinion that national banks could purchase and sell securities only for existing customers of the bank and had to receive prior payment or have assets of the customer on hand to cover the transaction. Transactions were to be undertaken solely as an accommodation to the existing customers, and compensation was limited to the fair cost of handling the transaction. 1 *Bull. of the Comptroller of the Currency*, No. 2 at 2-3 (Oct. 26, 1936). These views were codified in Paragraph 220 of the Comptroller's first *Digest of Opinions* in 1948, although the compensation provision was relaxed slightly. It was relaxed further in Paragraph 220A of the 1957 edition of the *Digest of Opinions*. In 1963, when the *Digest of Opinions* was superseded by the

Comptroller's Manual for National Banks, all the provisions limiting the securities brokerage activities of national banks were deleted entirely.

The Office's early restrictive views are explained in a 1974 letter by Comptroller James E. Smith as reflecting "the great caution of banking regulations in the years immediately following the 1931-2 debacle." Letter to G. Duane Vieth (June 10, 1974). The letter went on to state that the early interpretations contained restrictions not imposed by the statute and accordingly were currently viewed to be erroneous. The letter enunciated this position in permitting national banks to offer Automatic Investment Service (AIS) programs to customers. Under AIS programs banks would provide lists of corporations to their customers and then periodically purchase for them shares of stock of the companies selected by the customers from the list, paying for the securities by debiting the customers' checking acccounts. The brokerage services thus offered AIS customers are functionally equivalent to, albeit somewhat more narrow in scope than, the services Security Pacific proposes to offer to Discount Brokerage customers. As in the case of an AIS program, as discussed in detail in the 1974 letter, the services covered by this application are clearly authorized by the language of Section 16 of the Glass-Steagall Act and do not contravene the purposes of the Act, either by subjecting banks to material risks or by placing them in situations with unacceptable conflicts of interest deriving from the promotional pressures facing them. *See Investment Company Institute* v. *Camp*, 401 U.S. 617, 631-38 (1971).

The rejection of the restrictive position reflected in the Office's early opinions has found support in the courts. In *New York Stock Exchange, Inc.* v. *Smith*, 404 F. Supp. 1091 (D.D.C. 1975), *vacated on other grounds, sub nom., New York Stock Exchange* v. *Bloom*, 562 F.2d 736 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 942 (1978), the court upheld the broader position adopted in the 1974 AIS letter. Specifically citing the argument made in the 1974 AIS letter that the early opinions "embodied an overcautious approach to bank regulation re-

flecting the atomsphere [sic] of the years immediately after the 1929 market crash rather than the legislative history of the act," the court went on to endorse AIS programs as falling within the statutory authorization of Section 16 of the Act and not presenting any of the risks discussed in the Act's legislative history or the judicial elaboration of it. *New York Stock Exchange, Inc.* v. *Smith*, *supra*, at 1097-1100.

Various statements by the Supreme Court in cases addressing Glass-Steagall Act issues suggest that the express language of the Act is the primary factor in any analysis and that securities brokerage activities by banks are not proscribed by the Act. In *Investment Company Institute* v. *Camp*, 401 U.S. 617 (1971), the Court analyzed a bank's participation in the organization, distribution, and marketing of shares of an investment company consisting of commingled managing agency account assets held by the bank as fiduciary. The Court found the bank's participation to clearly contravene the express language of Section 16 of the Act and to further subject the bank to the risks and conflicts Congress sought to obviate by the Act. Accordingly, the Court found the bank's program to be in violation of the Act. The Court was careful, however, to distinguish this prohibited activity from permissible activities, including purchases as agent for customers of securities. *Id.* at 623 n.10, 624-25.

The same type of statutory analysis was used by the Court in *Board of Governors of the Federal Reserve System* v. *Investment Company Institute*, 450 U.S. 46 (1981). That case upheld a ruling of the Federal Reserve Board (FRB) that serving as investment adviser to an open-end investment company and organizing and sponsoring, subject to certain limitations, a closed-end investment company were closely related to banking and could legally be undertaken by bank holding companies and their nonbank subsidiaries. The Court could find no prohibition of this conduct in the various provisions of the Glass-Steagall Act and accordingly rejected arguments based solely on broad statements of the policies embodied in the Act. The Court described the analysis employed in *Investment*

Company Institute v. *Camp*, *supra*, as relying "squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act." 450 U.S. at 65. The Court went on to explain that the analysis of the risks presented in the earlier case was necessary only to respond to arguments on behalf of the bank that despite the literal prohibition on the conduct then at issue it was not the intent of Congress to prohibit it. 450 U.S. at 66. The Court also reiterated its earlier views that purchases of securities by banks acting as agent for their customers are specifically authorized by the Glass-Steagall Act. 450 U.S. at 55-56 n.18.

There is language in the legislative history of the Glass-Steagall Act to the effect that national banks were to be authorized by Section 16 to engage in securities brokerage transactions "to the same extent as heretofore." This language appears only to have meant generally that the ability of national banks to engage in brokerage transactions was to be subject to no additional constraints after the enactment of the Glass-Steagall Act beyond those applicable before its enactment. This analysis appears to have been adopted by the court in *New York Stock Exchange, Inc.* v. *Smith*, 404 F. Supp. 1091, 1098. Noting that there was considerable evidence that prior to 1933 banks did engage in brokerage transactions, the court concluded that even if the AIS programs under consideration were viewed as a more extensive involvement by banks in the brokerage business than existed prior to 1933, they nonetheless were not prohibited by the statutory language or the legislative history if they did not give rise to risks materially different from those normally associated with brokerage transactions. In view of the significant changes that have taken place since 1933 in the nature and delivery of brokerage services, this approach seems particularly appropriate.

The same argument concerning the "heretofore" language applies to the incidental activities that Security Pacific intends to perform through Discount Brokerage. That is, such functions as maintaining custody of securities for customers and clearing and settling their securities transactions, even in the absence of evidence that banks provided those services prior to 1933, do not exceed the statutory authorization in Section 16 of the Glass-Steagall Act so long as Discount Brokerage

maintains its agency status in the transactions. Since these activities do not involve Discount Brokerage's taking any position in securities and do not create any promotional pressures by associating Discount Brokerage's name or financial prospects (or Security Pacific's) with that of any securities issuer, they do not appear to give rise to any of the risks the Act sought to address. It should also be noted that these types of activities are regularly performed by national banks, without any explicit statutory authorization beyond the incidental powers language of 12 U.S.C. § 24 (Seventh), in connection with the U.S. government and municipal securities dealer activities authorized in that Section.

The "heretofore" language in the legislative history could also be cited in connection with Security Pacific's intention to seek membership on national securities exchanges for Discount Brokerage. Because of certain rules of at least the New York Stock Exchange (NYSE) prior to 1933, direct stock exchange membership by a national bank would have been impossible then. However, the large commercial banks clearly did have their representatives on the floor of the exchanges. *See, e.g.*, Sobel, *NYSE* 13-14 (1975). Further, various private bankers were members of the exchanges prior to the passage of the Glass-Steagall Act and at least one such company has maintained continuous NYSE membership since before the passage of the Act. In this regard, the NYSE proposed to adopt new Rule 310 in 1976 that would have prohibited a commercial bank not then a member of the NYSE from becoming such a member. The Glass-Steagall Act was cited by the NYSE as one reason for proposing the rule. In rejecting this rule, the Securities and Exchange Commission expressed skepticism about permitting existing bank members of the NYSE to retain their membership while prohibiting additional banks from joining, since Section 21 of the Glass-Steagall Act* (12 U.S.C.

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* Section 21 of the Glass-Steagall Act prohibits any person engaged in the issuing, underwriting, selling, or distributing of securities from also engaging in the business of receiving deposits. The Section expressly states, however, that activities authorized by Section 16 of the Glass-Steagall Act are not prohibited for depository institutions, including private bankers.

§ 378) does not contain a grandfathering exception. The Commission concluded, quite properly, that the NYSE's position was subject to substantial doubt and, in any event, that resolution of the issue should be left to the federal banking agencies or the courts. *See* Securities Exchange Act Release No. 12737 (Aug. 25, 1976).

Whatever the pre-1933 history reveals with respect to exchange membership, however, should not be determinative of whether national banks may now be such members. The relevant concern is whether national banks as exchange members can conform their functional participation in securities transactions to the agency role permitted in Section 16 of the Glass-Steagall Act. Since acting solely in an agency capacity is possible, *see, e.g.*, NYSE Rule 91, and is the stated intention of Security Pacific for Discount Brokerage, exchange membership will not create any risks inconsistent with the brokerage role envisioned in the Act as pemissible for national banks.

An additional Glass-Steagall Act issue arises when a bank chooses to conduct securities brokerage operations through an operating subsidiary. Section 20 of the Act, 12 U.S.C. § 377, prohibits affiliations between member banks, including all national banks, and companies "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities." Early on, the Supreme Court interpreted the identical list of restricted functions in Section 32 of the Glass-Steagall Act, 12 U.S.C. § 78, not to include securities brokerage activities of a company. *Board of Governors of the Federal Reserve System* v. *Agnew*, 329 U.S. 441, 445-49 (1947). Such an interpretation seems appropriate and is, of course, entirely consistent with the view that Congress was trying to eliminate only certain risks, not including those associated with securities brokerage activities, from the commercial banking system.

Accordingly, the activities proposed by Security Pacific for Discount Brokerage are within the corporate powers of national banks and their operating subsidiaries and are not limited by the Glass-Steagall Act.

McFadden Act

Security Pacific's application indicates that it intends to offer Discount Brokerage's services through offices that are not bank branches or the bank's main headquarters, as well as through chartered offices. It is, of course, an element of our approval of the application that the geographic limitations effectively imposed by the National Bank Act's branching provisions, commonly referred to as the McFadden Act, not be violated. 12 U.S.C. § 36. "Branch" is statutorily defined to include "any branch bank, branch office, branch agency, additional office or any branch place of business . . . at which deposits are received, or checks paid, or money lent." 12 U.S.C. § 36(f). Security Pacific's legal memorandum, submitted as part of the application, expresses the opinion that the non-chartered offices at which Discount Brokerage will offer its services will not constitute branches under the McFadden Act because none of the statutory branching functions will be performed there.

Lending Money

Regarding the lending of money, the application states that Discount Brokerage will not make margin loans at non-branch offices. Such offices will be limited to the performance of tasks associated with loan origination within parameters analogous to those authorized by the Comptroller's Interpretive Ruling 7.7380 (12 C.F.R. § 7.7380). Interpretive Ruling 7.7380 authorizes the

> [o]rigination of loans by employees or agents of a national bank or of a subsidiary corporation at locations other than the main office or a branch office . . . *[p]rovided*, [t]hat the loans are approved and made at the main office or a branch office of the bank or at an office of the subsidiary located on the premises of, or contiguous to, the main office or branch office of the bank.

12 C.F.R. § 7.7380(b).

The Comptroller has identified certain loan solicitation and origination activities that clearly may be performed by loan production offices within the scope of the Interpretive Ruling. These include:

1) solicitation of loan business, including by means of advertisements disclosing the nature and limitations of the [loan production office];

2) providing information as to loan rates and terms;

3) interviewing and counseling applicants regarding loans (only), including the provision of disclosures required by regulations;

4) aiding customers in the completion of loan applications.

See, e.g., Letter from John G. Heimann, Comptroller of the Currency, to Exchange National Bank & Trust Company of Atchison, Atchison, Kansas (Jan. 31, 1979).*

Security Pacific's legal memorandum indicates that Discount Brokerage offices at non-branch locations will interview and counsel customers on loan rates and terms and aid customers in the completion of margin loan applications. Loan applications will then be transmitted to a chartered office at which they will be processed and at which any credit will be extended. The performance of these and other solicitation and origination activities, analogous to those outlined above, at non-branch Discount Brokerage offices in connection with the extension of margin credit at chartered offices would not, in our opinion, constitute lending money within the meaning of the McFadden Act.

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* In *Independent Bankers Association of America* v. *Heimann*, 627 F.2d 486, 488 n.** (D.C. Cir. 1980) (*IBAA* v. *Heimann*), the court expressed general agreement with the non-branch status of loan production offices engaging in the limited array of functions set out in the letter.

Receiving Deposits

In addition to margin lending, Discount Brokerage will also maintain, and pay interest on customer credit balances arising incidentally to its brokerage business, including (1) funds awaiting investment, (2) interest or dividends received on a customer's securities held in "street" name and (3) proceeds from securities sold by the broker awaiting reinvestment or other instructions from the customer. Security Pacific takes the position that these credit balances are not deposits and, therefor, that Discount Brokrage will not be receiving deposits within the meaning of the McFadden Act.

Credit balances arising incidentally to brokerage activities may be distinguished, as correctly noted in Security Pacific's legal memorandum, on certain functional and legal grounds from bank deposits. Bank deposits are generally funds placed with a depository institution for the primary purpose of safekeeping, earning a return in the form of interest, or facilitating payments to third parties. They may be withdrawn at the discretion of the depositor under the terms and conditions of the account. The receipt of deposits is a principal function of banks, which publicly solicit deposits to provide funds to be used in the banks' lending business. Credit balances maintained by brokers, on the other hand, arise in connection with securities transactions of customers and, as such, are not directly solicited from the public. Indeed, the Securities Investor Protection Act, 15 U.S.C. § 78aaa *et seq.*, operates to restrict the advertising, promotional and selling practices of brokers regarding interest-bearing free credit balances. *See* Securities Exchange Act Release No. 18262 (Nov. 17, 1981). Further, there are specific regulatory restrictions regarding the use of credit balances by brokers. 17 C.F.R. § 240.15c3-2.

It should be noted, too, that securities firms regularly maintain and pay interest on customer credit balances, apparently in the belief that this practice does not violate the prohibition in Section 21 of the Glass-Steagall Act against the receipt of deposits by such firms. 12 U.S.C. § 378(a)(1). The

prevalence of this practice argues against the characterization of customer credit balances as deposits generally.

Security Pacific also points to the non-deposit treatment of credit balances by the FRB in connection with balances maintained by "agencies" under the International Banking Act of 1978, 12 U.S.C. § 3101 *et seq.*, and by investment companies chartered under Article XII of the New York Banking Law. The value of these examples, which have been drawn from the specialized context of international finance, is, however, clouded by the inclusion of "credit balances" within the definition of "deposits" in FRB Regulation D, 12 C.F.R. § 204.2(a)(1)(vi). Even assuming that credit balances are treated as deposits for the narrow monetary control purposes of Regulation D, however, it should be recognized that the meaning of deposit may be different in other regulatory or statutory contexts, such as under the McFadden Act. Based on all of the foregoing considerations, it is our opinion that credit balances arising in connection with securities brokerage transactions are not deposits within the meaning of the McFadden Act.

Non-enumerated Functions

It is further possible that Discount Brokerage offices could be found by a court to be branches within the meaning of the McFadden Act even in the absence of a finding that they receive deposits, pay checks or lend money. In *St. Louis County National Bank* v. *Mercantile Trust Company National Association*, 548 F.2d 716 (8th Cir.), *cert. denied*, 433 U.S. 909 (1977) (*St. Louis County*), a trust office operated by a national bank, which conducted a substantial amount of trust business at its main office, was held to be a branch, even though no deposits were received, checks paid or money lent at such office.

In the view of the Eighth Circuit, at least, the transaction with the public of certain business routinely carried on at the bank's main office constitutes branch banking activity for McFadden Act purposes. This Office finds the approach taken

by the court in *St. Louis County* an overly broad reading of the statute, and we believe that the court's holding should at the very least be limited to those dealings with the public requiring a specialized banking or similar license. In any event, finding that securities brokerage activities constitutes a branch banking function would appear particularly inappropriate in view of the number of banks currently operating U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations on both an intra-state and interstate basis.

The application states the intention that an operations department, perhaps located outside California, will maintain record custody of securities held in accounts and be responsible for clearing and settlement of transactions, although initially a clearing broker may be employed to carry on some of these activities. A number of banks currently operate similar non-branch facilities to carry out these ministerial tasks relating to their municipal and government securities dealing and underwriting activities. Since the McFadden Act issue would be the same in the case of the Discount Brokerage operations department, the long-standing and widespread nature of the practice of bank municipal and government securities dealers is obviously relevant. It is, therefore, our opinion that ministerial functions not involving direct dealing with the public, such as the maintenance of record custody and the clearing and settlement of transactions, do not constitute branching functions either as enumerated in Section 36(f) or even under the expansive *St. Louis County* approach. *Cf. Independent Bankers Association of America* v. *Smith*, 534 F.2d 921, 936 (D.C. Cir. 1976) (no competitive advantage in dealing with public can arise from these ministerial services).

Location Where Services Are Provided

It is, of course, an element of our approval of the application that all essential branch banking functions performed in connnection with Discount Brokerage's operations be performed at chartered offices. In our opinion, the activities of

Discount Brokerage, viewed individually or collectively (with the exception of the making of margin loans, treated separately above), should reasonably be found not to constitute branch banking for purposes of the McFadden Act.

FRB Regulations D and Q

It is also an element of approval of the application that Discount Brokerage and Security Pacific comply with FRB Regulation D, 12 C.F.R. Part 204, and FRB Regulation Q, 12 C.F.R. Part 217. Security Pacific states in its legal memorandum that Regulations D and Q are not applicable because credit balances arising in the course of a brokerage business are not deposits within the meaning of those regulations. As pointed out earlier, however, Regulation D seemingly defines "deposits" to include "credit balances," 12 C.F.R. § 204.2(a)(1)(vi). And even though Discount Brokerage would not appear to be a "depository institution," as defined in 12 C.F.R. § 204.2(m)(1)(i), its "obligations" may be treated as "obligations" of Security Pacific ("parent depository institution") under 12 C.F.R. § 204.3(a) ("Computation and maintenance").

This office recommends that Security Pacific should accordingly consult the FRB concerning the applicability of Regulations D and Q to this matter.

Federal Deposit Insurance

It is a further element of approval of the application that Discount Brokerage comply with all applicable provisions of the Federal Deposit Insurance Act, 12 U.S.C. § 1811 *et seq.* Security Pacific states in the application that Discount Brokerage will apply for membership in Securities Investor Protection Corporation ("SIPC") so that customers' cash and securities held by Discount Brokerage will be protected by SIPC insurance coverage, and that cash held by Discount Brokerage will not be insured by the Federal Deposit Insurance Corporation ("FDIC"). As in the matter of applicability of FRB Regula-

tions D and Q, this Office recommends that Security Pacific consult the FDIC in this regard.

Conclusion

This Office has carefully considered the legality of the activities proposed by Security Pacific for Discount Brokerage. For the reasons presented above, we believe these activities are legally permissible. Based on this legal analysis and our consideration of other relevant information presented by Security Pacific, the application is approved this day.

/s/ _____
Doyle L. Arnold
Senior Deputy Comptroller
for Policy and Planning

Dated: 26 August 1982

September 20, 1982

Mr. Richard C. Raines
Senior Vice President
Union Planters National Bank of Memphis
67 Madison Avenue
Memphis, Tennessee 38103

Dear Mr. Raines:

The Office of the Comptroller of the Currency has approved the bank's application to acquire Brenner Steed & Associates, Inc., Memphis, Tennessee.

Please advise the Regional Administrator of National Banks in Memphis of the date on which the acquisition of the subsidiary is consummated and furnish its exact address, including street number, and the corporate name.

Very truly yours,

/s/
James E. Brennan
Manager, Bank Structure Analysis
Bank Organization and Structure

bcc: Case
Region 8
Chron:JFA
Chron:JEB
Chron:jj
reader
JFAlmand/jj/September 20, 1982 0880C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5026

SECURITIES INDUSTRY ASSOCIATION

v.

COMPTROLLER OF THE CURRENCY, *et al.*, APPELLANTS

No. 84-5085

SECURITIES INDUSTRY ASSOCIATION, APPELLANT

v.

C.T. CONOVER
COMPTROLLER OF THE CURRENCY,
OFFICE OF THE COMPTROLLER OF THE CURRENCY

On Suggestions For Rehearing *en banc* of the Comptroller of the Currency, Filed May 28, 1985, and Intervenor, Security Pacific National Bank, Filed June 12, 1985

Opinion Filed July 12, 1985

Before: ROBINSON, *Chief Judge*; WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, *Circuit Judges*

ORDER

The suggestions for rehearing *en banc* of Security National Bank and the Comptroller of the Currency have been circulated to the full Court. A majority of the judges of the court in regular active service have not voted in favor thereof. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam

Chief Judge Robinson and Circuit Judge Wald did not participate in this order.

A dissenting statement of Circuit Judge Scalia, joined by Circuit Judges Bork and Starr, is attached.

SCALIA, *Circuit Judge*, with whom *Circuit Judges* BORK and STARR join, dissenting: The panel opinion in this case upheld the judgment of the District Court, in a suit brought by an association of brokerage houses, that the Comptroller violated sections 7(c) and 8 of the McFadden Act, 12 U.S.C. §§ 36(c), 81 (1982), in permitting national banks to conduct discount brokerage operations at locations other than their main banking offices and authorized branches.

The McFadden Act restricts only the *location* and not (unlike the Glass-Steagall Act, ch. 89, 48 Stat. 162 (1933) (codified as amended in scattered sections of 12 U.S.C.) (1982)) the *nature* of bank activities. It is uncontroverted that its purpose was to establish competitive equality between state and federal banks by authorizing branching by federally chartered banks to the same extent as permitted to state banks by state law. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy.

More importantly, however, the District Court, whose reasoning was adopted by the panel opinion, did not, in my view, base its standing decision merely on this erroneous construction of the language and purpose of the McFadden Act. My reading of the District Court opinion is that the Securities Industry Association's members (1) would have standing to sue under the Glass-Steagall Act, which restricts the scope of activities that national banks can engage in, and (2) would be

actually harmed by attempts by national banks to exceed the locational curbs of the McFadden Act. This entirely reduces the "zone of interest" inquiry under the McFadden Act to an inquiry into "injury in fact," as the conclusion of the McFadden Act standing portion of the opinion demonstrates:

> To be sure, the McFadden Act restricts national banks not in the type of business they may conduct but where they may conduct it. Still, attempts to exceed those curbs would harm SIA's members just as the data processors in *Data Processing* and the tour operators in *Arnold Tours*. Accordingly, SIA is arguably within the zone of interests sought to be protected by the Act.

Securities Industry Ass'n v. *Comptroller of the Currency*, 577 F. Supp. 252, 258-59 (D.D.C. 1983). But neither standing under the Glass-Steagall Act (a statute the functional equivalent of which was at issue in *Data Processing* and *Arnold Tours*) nor injury in fact—nor the two combined—suffice to satisfy the zone of interests test under the *McFadden Act*. Thus, the District Court opinion holds either that standing under one statute confers standing to raise challenges under a separate statute—which is inconsistent with *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 140-41 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), and indeed with the whole principle behind the zone test—or that injury in fact is sufficient to confer standing—which discards the zone test entirely.

On the merits, too, the District Court's—and thus the majority's—conclusion that discount brokerage offices operated by national banks are branches seems mistaken. The McFadden Act defines a branch to "include" any place "at which deposits are received, or checks paid, or money lent," 12 U.S.C. § 36(f) (1982), which plainly does not describe a discount brokerage office. The District Court found, however, that the statutory definition of branches is not limited to offices performing one or more of these enumerated functions, basing this conclusion on remarks by Rep. McFadden made after passage of the Act, an opinion of the Eighth Circuit

(followed nowhere else) finding trust offices to be branches, *St. Louis County National Bank* v. *Mercantile Trust Company National Ass'n*, 548 F.2d 716 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977), and dicta in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122 (1969). It seems to me, however, that the *Plant City* dicta are virtually dispositive *in favor of the Comptroller.* The Court said:

> Although the definition may not be a model of precision in part due to its circular aspect, it defines the minimum content of the term "branch" by use of the word "include." *The definition suggests a calculated indefiniteness with respect to the outer limits of the term.* However, the term "branch bank" at the very least includes any place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135 (emphasis added). It seems to me that a statute containing a "calculated indefiniteness" presents precisely the situation in which our deference to the agency should be at its height. *See Chevron, USA, Inc.* v. *NRDC, Inc.*, 104 S. Ct. 2778, 2782 (1984). The Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness—or indeed that the range includes *only* the enumerated functions—cannot by any means be considered unreasonable, even if we think it mistaken.

This circuit plays a leading role in formulating banking law, and administrative law generally, and this case squarely presents important questions in both areas. I think it should have been heard by the full court.

For OC Office Use Only
Application No. 82-08-09-001

APPLICATION TO ACQUIRE AN OPERATING SUBSIDIARY

June 23, 1982

To: REGIONAL ADMINISTRATOR OF NATIONAL BANKS
Eighth National Bank Region
165 Madison Avenue, Suite 800
Memphis, Tennessee 38103

From: Union Planters National Bank of Memphis
(Exact Corporate Title of Bank)
Charter No. 13349

67 Madison Avenue
(Exact Street Address of Head Office)
Memphis; Shelby County, Tennessee 38103
(City, County, State, Zip Code)

Sir:

Application is hereby made for permission to acquire an existing business to be controlled by the Bank as an operating subsidiary. The Bank proposes to acquire:

Brenner Steed & Associates, Inc. of Memphis
(Name of Business) (City)
Tennessee
(State)

A copy of the acquisition agreement between the Bank and the business to be acquired is attached. The agreement provides, in part, that the Office of the Comptroller of the Currency may examine the proposed subsidiary prior to making a determination concerning the proposal.

A certified copy of a resolution of the Board of Directors authorizing the acquisition of the operating subsidiary and the filing of the application is enclosed.

It is hereby certified that all representations and information in this application and with respect to any other document or paper submitted in connection with the application contain no misrepresentations or omissions of material facts.

(Seal of Bank)

/s/ Richard C. Raines
Authorized Officer
Senior Vice President

Requests for additional information or other communications concerning this proposal should be directed to:

Richard C. Raines
(Name)
Senior Vice President and House Counsel
(Title)
Legal Dept.
Union Planters National Bank of Memphis
67 Madison Avenue
Memphis, Tennessee 38103
(Mailing Address)
901-523-6596
(Telephone No.)

All questions should be answered completely. If answer is no or none, this should be indicated. The questions should not be answered merely by referral to other documents. To the extent possible, they should be answered in the space provided with insert pages utilized as necessary. All dollar amounts should be rounded to the nearest thousand, unless otherwise noted.

* * * * *

20. IDENTIFY AND COMMENT UPON ANY SPECIAL CONSIDERATIONS THAT WOULD BE GERMANE TO AN EVALUATION OF THE PROPOSED ACQUISITION, AND ARE NOT COVERED ELSEWHERE IN THIS APPLICATION. AN EXAMPLE OF SUCH CONSIDERATION WOULD BE IF THE APPLICANT INTENDS TO SIGNIFICANTLY EXPAND THE PRESENT VOLUME OF ACTIVITIES OF THE PROPOSED SUBSIDIARY.

Discount brokerage services are an important competitive alternative to traditional brokerage services. While discount brokers do not, and as a subsidiary of Applicant Brenner Steed could not, offer the full range of services rendered by traditional broker-dealers and investment bankers, the price competition offered by discount brokers is definitely in the public interest in that it affords a low-cost alternative to the traditional broker-dealer's services. Affiliation with Applicant would make these services available to a broader range of customers. The acquisition would also facilitate making discount brokerage services available to smaller investors who may not be familiar with the services of discount brokers. This would be effected by the offering of Brenner Steed's services to Applicant's customers through selected branches of Applicant in Shelby County, Tennessee, to customers of its present affiliate banks in Middle and East Tennessee, and to customers of Applicant's correspondent banks, over 400 in number located primarily in Arkansas, Tennessee, Louisiana, Mississippi, Missouri, Kentucky and Alabama. Applicant feels that the offering of such discount brokerage services would constitute "a pro-competitive force in a business which has been criticized for unduly rigid pricing patterns and restrictions to entry." Comptroller's Letter (1973-78) Fed. Bank L. Rep. at Para. 81,363. Upon the acquisition of Brenner Steed by Applicant, discount brokerage services would be available, for example, in Memphis, Nashville, Chattanooga and Knoxville, Tennessee. This would be accomplished through Applicant's branches and existing and proposed affiliate banks. Thus, additional competition would be provided to the existing discount brokerage services located in those cities, resulting in

benefits to investors in those cities. Investors in smaller cities and towns who do not now have access to discount brokerage services would have access to Applicant's discount brokerage services through Applicant's affiliate and correspondent banks. In addition, as Applicant gains additional affiliate banks, Applicant's discount brokerage services would be available to additional investors living in the markets of such affiliates.

The acquisition of Brenner Steed by Applicant would not result in a lessening of competition in the discount brokerage industry because Applicant does not now engage, to any appreciable extent, in the brokerage business. Applicant has never solicited business of this nature and has never publicized any availability to perform it to its customers and accordingly has not performed such services to any material extent in the past.

RELEVANT PROVISIONS OF THE BANKING ACT OF 1933 (THE GLASS-STEAGALL ACT)

SECTION 16:

12 U.S.C. § 24. *Corporate Powers of Associations*

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this chapter. The business of dealing in securities and stock by the association shall be limited to purchasing and selling such securities and stock without recourse, solely upon the order, and for the account of, customers, and in no case for its own account, and the association shall not underwrite any issue of securities or stock: *Provided*, That the association may purchase for its own account investment securities under such limitations and restrictions as the Comptroller of the Currency may by regulation prescribe. . . . As used in this section the term "investment securities" shall mean marketable obligations, evidencing indebtedness of any person, co-partnership, association or corporation in the form of bonds, notes and/or debentures commonly known as investment securities under such further definition of the term "investment securities" as may by regulation be prescribed by the Comptroller of the Currency. Except as hereinafter provided or otherwise permitted by law, nothing herein contained shall authorize the pur-

chase by the association for its own account of any shares of stock of any corporation. The limitations and restrictions herein contained as to dealing in, underwriting and purchasing for its own account, investment securities shall not apply to obligations of the United States, or general obligations of any State or of any political subdivision thereof, or . . .

SECTION 20:

12 U.S.C. § 377. *Affiliation with Securities Corporation; Penalties*

After one year from June 16, 1933, no member bank shall be affiliated in any manner described in subsection (b) of section 221a of this title with any corporation, association, business trust, or other similar organization engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.

SECTION 21:

12 U.S.C. § 378. *Dealers in Securities Engaging in Banking Business; Individuals or Associations Engaging in Banking Business; Examinations and Reports; Penalties*

(a) After the expiration of one year after June 16, 1933, it shall be unlawful—

(1) For any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor: *Provided*, That the provisions of this para-

graph shall not prohibit national banks or state banks or trust companies (whether or not members of the Federal Reserve System) or other financial institutions or private bankers from dealing in, underwriting, purchasing, and selling investment securities, or issuing securities, to the extent permitted to national banking associations by the provisions of section 24 of this title: *Provided further*, That nothing in this paragraph shall be construed as affecting in any way such right as any bank, banking association, savings bank, trust company, or other banking institution, may otherwise possess to sell, without recourse or agreement to repurchase, obligations evidencing loans on real estate;

* * *

SECTION 32:

12 U.S.C. § 78. *Certain Persons Excluded from Serving as Officers, Directors or Employees of Member Banks*

No officer, director or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments.